UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

CAYUGA MEDICAL CENTER
AT ITHACA, INC.

and **Cases 03-CA-185233**
03-CA-186047

1199 SEIU UNITED HEALTHCARE WORKERS EAST

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER MATERIALS

I. PRELIMINARY STATEMENT

Cayuga Medical Center at Ithaca, Inc. ("Respondent") operates a full-service community hospital in Ithaca, NY. In about April 2015 Respondent's nurses began a campaign for representation by 1199 SEIU United Healthcare Workers East ("Union"). Anne Marshall was undisputedly the lead union organizer and the reason Respondent terminated her employment on October 6, 2016.

Respondent acted immediately and aggressively to stop the organizing campaign and its actions were the subject of a previous hearing and administrative law judge decision ("ALJD"). On October 28, 2016, Administrative Law Judge David I. Goldman ("ALJ Goldman") concluded that Respondent had committed myriad unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act ("Act"). Many of those violations were disciplines and unlawful statements aimed at Anne Marshall because of her union activity. ALJ Goldman also concluded that Respondent had repeatedly violated the Act by tearing down union flyers. Now, Respondent is charged with violating Section 8(a)(1) and (3) of the Act because it suspended and terminated Anne Marshall and Loran Lamb for engaging in union activities and Section 8(a)(1) of the Act for continuing to remove pro-union flyers from bulletin boards.

II. STATEMENT OF THE CASE

This matter was heard before Administrative Law Judge Kimberly Sorg-Graves (ALJ) from January 9-12, February 27-March 3, March 6-10, and April 3-4, 2017. An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) in Cases 03-CA-185233 and 03-CA-186047 issued on November 29, 2016. (GC Ex. 1(g)).[1]

[1] References to the October 28, 2016 ALJ's Decision shall be designated as (ALJD ___:___) showing the page number first followed by the line numbers; to the transcript in the first administrative hearing as (Hearing #1 Tr. __) where the blank is the page number; to the General

The Complaint, as amended orally at hearing, alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating employees Anne Marshall and Loran Lamb because of their union activity in support of the Union. The Complaint further alleges that Respondent violated Section 8(a)(1) by removing pro-union literature from the bulletin board.[2]

In its Answer, Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a healthcare institution within the meaning of Section 2(14) of the Act. (GC Ex. 1(i)). Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Ex. 1(i)).

Respondent admits that the following individuals held the positions set forth below and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Vice President of Human Resources Brian Forrest, Vice President of Patient Services and Chief Nursing Officer Deb Raupers, Chairman of Pathology and Laboratory Medicine and Medical Director of Laboratories Daniel Sudilovsky, Assistant Vice President for Patient Services and Acting Director of the Intensive Care Unit Linda Crumb, Chief Patient Safety Officer and Director of Quality and Patient Safety Karen Ames, Director of Patient Customer Relations Jacqueline Barr, Director of ICCU until about April 2015 Shawn Newvine, and Director of Medical Palliative and Telemetry Units Kansas Underwood. (GC Ex. 1(n)). Respondent further admits that it suspended Loran

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Counsel's Exhibits in the first administrative hearing as (Hearing #1 GC Ex. ___); to the Respondent's Exhibits in the first administrative hearing as (Hearing #1 R. Ex. ___); to the transcript in the current administrative hearing as (Tr. _____) where the blank is the page number; to the General Counsel's Exhibits as (GC Ex. _____); to the Respondent's Exhibits as (R. Ex. ____); and to the Charging Party Union's Exhibits as (U. Ex. _____).

[2] There was also a *Johnnie's Poultry* allegation added at hearing which has since been withdrawn.

Lamb on about September 21, 2016[3] and terminated her on about October 5. Respondent admits it suspended Anne Marshall on about October 4 and terminated her on about October 6.

Respondent denies that it violated Section 8(a)(1) and (3) of the Act by engaging in any of the conduct alleged in the Complaint. Specifically, Respondent denies that Barr prohibited employees from posting union literature while permitting non-union postings. (GC Ex. 1(i)). Finally, Respondent denies that it suspended and terminated Marshall and Lamb because of their union activities. (GC Ex. 1(i)).

III. FACTS

A. Background

This is not the first case where Respondent has been charged with violating the Act. On October 28, 2016, ALJ Goldman concluded that Respondent had committed a slew of unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, including: maintaining unlawfully overbroad employee rules, disciplining an employee because of his protected and concerted activities pursuant to an unlawfully overbroad rule, soliciting employees to report on union activities, directing employees to cease distributing union literature, telling employees it was inappropriate to discuss salaries and/or wages, interrogating Marshall about her union activities, threatening Marshall with unspecified reprisals if her union activities did not cease, prohibiting the distribution and posting of union literature, removing and confiscating union literature, and threatening employees with unspecified reprisals and job loss in retaliation for participation in protected and concerted activities. (ALJD at 70:1-45; ALJD at 73:9-40; ALJD at 74:4-12).

[3] Dates contained hereafter are 2016 unless otherwise noted.

The ALJ further concluded that Respondent violated Section 8(a)(3) and (1) of the Act by suspending Marshall, issuing a verbal warning to Marshall, demoting Marshall, and issuing Marshall an adverse performance evaluation in retaliation for her union activities. (ALJD at 70:47-71:8; ALJD at 74:10-20). ALJ Goldman found extensive evidence of anti-union animus.

B. September 11, 2016 blood transfusion incident

On September 11, ICU RN Anne Marshall was assigned two patients, one of whom, SF, was under neutropenic precautions. (Tr. 1228, 1245). Sometime during the day, SF's doctor determined she needed a blood transfusion. Marshall testified that after receiving the doctor's order and making sure there was a consent form in SF's chart, she went about obtaining blood from the blood bank. (Tr. 1224-25). While waiting for the blood, Marshall went to the patient's room and premedicated her with Benadryl and Tylenol. Marshall scanned the patient's bracelet and confirmed the patient's name and date of birth before giving her the medication. (Tr. 1228). When the courier returned with the blood, Marshall approached RN and team leader Scott Goldsmith, that day's charge nurse, at the nurses' desk. (Tr. 1225). Marshall credibly testified that she asked Goldsmith to check the blood with her. (Tr. 1225). Goldsmith instructed Marshall to check it with RN Loran Lamb instead. (Tr. 1225). Lamb also had two patients that day, including one patient on a ventilator and in restraints. (GC Ex. 39; Tr. 1539).

Lamb agreed to check the blood with Marshall. They checked the blood at the nurses' desk, with Goldsmith standing several feet behind them, in front of the assignment board. (Tr. 1226). Marshall and Lamb's testimony is corroborative with regard to the process they used to check the blood. They checked that the blood had been ordered by a physician, then checked the written order in the chart. They looked in the chart for the signed consent form from the patient. The two nurses checked that the unit was not outdated and that the unit type and donor number

on the form matched the container. To check this, one of them read off the information from the blood bag, and the other verified that it matched the transfusion card. Finally, they checked that the patient name on the transfusion card matched that on the order and consent. (Tr. 1226, 1236-38, 1544). Marshall and Lamb filled out the blood transfusion card as they carried out the checks. (GC Ex. 2; Tr. 1544-45).

After checking the blood, Marshall brought the blood into the room. She wore a mask and gloves due to the patient's neutropenic precautions. (Tr. 1228). Lamb returned to her own patients. (Tr. 1546). SF and her sister, Star York, were in the room. Marshall testified that she explained to the patient that the blood had arrived and she would be hanging it. (Tr. 1227). She set up and primed the tubing and set up the blood. Marshall asked SF to confirm her name and date of birth, looked at her wristband, and then started the transfusion. (R. Ex. 20(b); Tr. 1228-29, 1238).[4] SF asked if Marshall had checked the blood. (Tr. 1247). Marshall told SF she had absolutely checked the blood, and had checked it out at the nurse's station with another nurse. (R. Ex. 20(b); Tr. 1229, 1247).

Marshall made sure the blood was running with no issues and then took the blood transfusion card off the blood bag. She brought the transfusion card back to the nurses' station because she had set the monitor to show SF's vitals at the 15-minute mark so they could be recorded. (Tr. 1230). Marshall testified that she did not see York approach the blood bag while she was in the room, nor did SF or York ask any questions beyond SF asking if the blood had been checked. (Tr. 1229, 1231). Marshall was also not questioned when she went into the room approximately five minutes later to do a visual check of the blood transfusion. Nor was Marshall questioned when she went into the room to end the transfusion. According to Marshall, SF's

[4] Marshall testified consistently on direct and cross examination that she checked SF's ID band, and said as much in her October 4, 2016 suspension meeting with Respondent. (Tr. 1229, 1368).

initial inquiry was the only time she or her family brought any concerns to her attention. (Tr. 1232-33).

Goldsmith could not recall whether Marshall asked him to check the blood with her. (Tr. 2936). He testified that as he was passing SF's room, she waved him inside. He entered without donning a mask and gloves per SF's neutropenic precautions. (Tr. 2967-68). SF and one other woman were in the room. (Tr. 2936). According to Goldsmith, SF asked him if it wasn't the protocol for nurses to check blood products against the patient's ID band. Goldsmith told her that was the protocol and asked if SF was saying her blood was not checked. SF told him that was correct. (Tr. 2932). Goldsmith testified that he checked the blood bag and noted that it was the right blood product and was signed and timed.[5] He checked the blood against SF's ID band and confirmed it was the right blood. (Tr. 2932, 2937). Goldsmith testified that he did not speak with York at all while in SF's room. (Tr. 2937).

Marshall testified that Goldsmith pulled her aside into the copy room and asked her if she had checked the blood for SF. Marshall responded that she had, and that Goldsmith had seen Marshall check the blood with Lamb at the nurses' station. (Tr. 1239). Lamb testified that she had overheard Goldsmith talking to Marshall and had then asked Marshall if everything was okay. Goldsmith overheard Lamb talking to Marshall and came to speak to her about the blood transfusion. According to Lamb, Goldsmith approached her, mentioned the transfusion, and asked if she knew she was supposed to check blood at the bedside. Lamb said she did know that and was sorry she had not done it this time. (Tr. 1548).

[5] Goldsmith's recollection that the blood transfusion card was still attached to the blood bag contradicts Marshall's testimony that she removed the transfusion card and brought it to the desk as she always does. Marshall's testimony should be credited on this point. Marshall was clear and confident in her testimony, while Goldsmith repeatedly qualified his testimony by stating that his recollection of what happened nine months prior was less than crystal clear. (Tr. 2925, 2936, 2941, 2949).

Goldsmith testified that after he left SF's room, he sought out Marshall and Lamb. He testified that he spoke to Marshall at the nurses' station and asked her if she had checked SF's ID band at the bedside. According to Goldsmith, Marshall said that she had checked it at the desk. Goldsmith asked Marshall where it should have been checked and she replied "at the bedside." (Tr. 2940). Goldsmith could not recall with specificity what else was said, other than that he told Marshall that they needed to check blood at the bedside and she said she would. (Tr. 2941).

Goldsmith could not recall how he knew Lamb was the second nurse involved in checking the blood, but he did know that he spoke to her after speaking with Marshall. He spoke to Lamb at the nurses' station. (Tr. 2941). Goldsmith testified that he asked Lamb whether she and Marshall had checked blood for a patient without checking at the bedside, and Lamb said they had. Goldsmith asked her where blood should be checked, and she replied "at the bedside." Goldsmith did not recall other specifics of the conversation other than that Lamb agreed that she would check blood at the bedside from then on. (Tr. 2942).

York, contrary to Goldsmith and Marshall, testified that she, her aunt, her uncle, and SF were all in the room when Marshall came in to do the blood transfusion. (Tr. 443, 484). Marshall was wearing a mask when she came into the room. (Tr. 450). York saw Marshall detach the blood transfusion card from the blood bag. (Tr. 450). York testified that as Marshall prepared to hang the blood, there were no red flags in her mind. (Tr. 451). According to York, SF asked about the protocol and Marshall said she had checked the blood at the desk. SF pointed out that it had never before been done that way. Marshall replied that that must have been a new nurse.[6]

[6] Marshall denies saying that it must have been a new nurse. However, even if York's testimony is credited on this point, the record evidence shows that the three prior blood transfusions SF received in the ICU during this particular admission were, in fact, performed by a new nurse, Andrew Barnes, who was being precepted by a more experienced nurse each time. (R. Ex. 62(a)-(c); Tr. 2771-72, 2782, 2787).

York recalled that Marshall scanned SF's ID band when premedicating her for the transfusion, but did not recall whether Marshall checked SF's ID band again when she hung the blood. (Tr. 488-89). After hanging the blood, Marshall left the room. York testified that she did not see Marshall again. (Tr. 446, 492-93). After Marshall left the room, York got up and looked at the blood herself. (Tr. 444). York testified that the charge nurse came into the room and SF told him she had gotten a transfusion, the primary nurse came in and hung the blood without a second nurse and it made her uncomfortable because in previous transfusions, two nurses had always been present. (Tr. 444-45).

Marshall and Lamb both testified they were familiar with the blood transfusion policy. Lamb testified that she was aware of the requirement that two RNs check the blood both outside and inside the patients' room, while Marshall testified that she was reminded of that fact after the incident. While Lamb testified that she knew the policy and was aware she and Marshall had made a mistake by not doing a two-nurse bedside verification, Marshall testified that she had forgotten that part of the policy due to many years of following the common ICU practice. (Tr. 1242-43, 1265-66, 1302). However, they both testified that common practice in the ICU was to check blood at the desk with two RNs, and then for the primary nurse to go into the room and do the second check. (Tr. 1242-43, 1665-66). Several nurses testified that they themselves had done the same thing that Marshall and Lamb did – fully check the blood at the nurses' station, and have only the primary nurse do the bedside check before administering the blood transfusion. (Tr. 72-74, 402, 589, 913, 923, 1115-16, 1730).

C. Respondent's conclusory investigation

Respondent's investigation into the September 11 blood transfusion was unusual from the beginning.[7] First, Goldsmith did not immediately file an incident report on the blood transfusion. Instead, he waited until the next day, September 12, to alert interim ICU director Linda Crumb about SF's complaint. He then waited another day to file the incident report. (R. Ex. 4; Tr. 2968-71). Former CMC supervisor Mike Doan testified that incident reports should be filed before the end of a shift, or on the next shift at the latest. (Tr. 1402).

Next, Crumb alerted Deb Raupers, who instructed her to have Karen Ames conduct an investigation. Ames, the chief patient safety officer, does not typically conduct investigations into incident reports. Ames testified that her role in investigations is normally to provide guidance to whoever is performing the actual investigation. (Tr. 843). Ames testified that she was assigned the investigation because it involved a patient complaint. (Tr. 866). However, patient complaints are normally handled by Jacqueline Barr, director of patient and customer relations.[8] (Tr. 2878-79; 3598-99). On examination by Counsel for the General Counsel, Ames was unable to recall any specific situations where she had actually performed an investigation herself. Later, on direct examination, she recalled three instances where she had done so, although she was unable to provide specifics. (Tr. 870).

[7] As one doctor aptly stated in response to the email that was circulated post-termination "I am miffed as to why my complaints and concerns are never followed up with such diligence." (GC Ex. 20).

[8] It is unclear why Respondent did not have Jacki Barr, who is responsible for handling patient complaints, handle the situation. Respondent called Barr but did not question her about it, and therefore Counsel for the General Counsel was precluded from questioning her on how patient complaints are typically handled and discerning her involvement in this case. Raupers, in response to Counsel for the General Counsel's questions, testified that Barr would be the best person to ask about the patient complaint and grievance processing system. (Tr. 3598-99).

Respondent did not speak to Lamb about the September 11 transfusion until September 21, when she was brought in for a meeting and summarily suspended. (Tr. 1550). Nor did Respondent attempt to contact Marshall before she left for vacation, even though she worked between September 11 and the date she left for her vacation. (Tr. 1238). Instead of speaking to the two nurses actually involved in the blood transfusion incident, Ames' investigation apparently had Linda Crumb look through SF's transfusion records, review all ICU blood transfusion cards from January 1 to September 11, 2016, and look through all incident reports relating to blood transfusions from October 2012 to August 2016. (Tr. 3067, 3068, 3081, 3083-84; GC Ex. 33). Crumb reported her findings back to Ames: none of the transfusion cards showed a failure to perform a two-nurse check at the bedside, nor did any incident reports address that narrow issue. (Tr. 3082, 3084).

Respondent's Nursing Peer Review Committee met twice regarding the September 11 incident; first on September 19 and again on September 23. (GC Ex. 16, 69; Tr. 3478, 3481). Both meetings were convened in contravention to the committee's own rules, as there were many departments unrepresented, importantly the ICU and the ED. (GC Ex. 15, 16; R. Ex. 59). At the September 19 meeting, Linda Crumb was present because Terri MacCheyne, the committee director, was unavailable. (Tr. 3139-40). The committee looked at the patient's chart and was unable to find any evidence of wrongdoing, although it was able to identify Anne Marshall as the patient's primary nurse due to documentation in the chart. (Tr. 3145, 3479). The committee could not reach a conclusion, and recommended that Respondent interview the nurses involved (Marshall and Lamb) as well as other staff. (Tr. 3137-38; GC Ex. 68, 69).

Furthermore, it was only after the Nursing Peer Review Committee met for the first time, that Respondent took certain additional measures. After the first committee meeting, Respondent

contacted Loran Lamb for the first time. When Ames and Crumb met with Lamb on September 21, instead of asking Lamb about the blood transfusion, they told her she was suspended. Notably, Lamb was not asked to provide an account of what happened on September 11. (R. Ex. 11). At the time of her suspension Lamb had an unblemished personnel file with no disciplines. (GC Ex. 42; Tr. 1555). After the committee meeting, Respondent received a written patient complaint from SF, which it had solicited. (R. Ex. 6; Tr. 3240). Finally, pursuant to the committee's direction, Raupers instructed Ames to interview ICU nurses about how they performed blood transfusions. (Tr. 3396).

Ames carried out this objective by going to the ICU on September 20 and attempting to interview various nurses on whether they followed the blood transfusion policy. Ames spoke to Joan Tregaskis, Anita Tourville-Knapp, Ananda Szerman, and Terri Ellis. (R. Ex. 9; Tr. 3396-97). All four nurses explained that they did not always follow the blood transfusion practice as prescribed. (Tr. 913, 975, 1082-84, 1705-06). Ames' account of her conversations with Tregaskis, Tourville-Knapp, and Szerman is inconsistent with what the three nurses testified occurred during their interaction with Ames. (GC Ex. 9, Tr. 978, 1117-18, 1134, 1163, 1727). Notably, Szerman's account is corroborated by the testimony of Louise McGarry. McGarry spoke to Szerman after being told by management in two separate meetings that all the nurses in the department perform blood transfusion according to the protocol. (Tr. 1159). Szerman assured McGarry that that was not the truth and that Szerman had told management that it was not the truth. (Tr. 1160, 1163).

Ames only spoke to four ICU nurses. If Ames or anyone from Respondent's management had spoken to other veteran nurses in the department, like Mary Day or Christine Monacelli, they would have gotten the same response: the nurses did not always follow the policy with respect to

where the transfusion checks were performed. (Tr. 72-74, 406, 589). Stated differently, the two nurse blood transfusion check often occurred at the nurses' station instead of at the bedside. Multiple nurses, including Respondent's witness Jennifer Cole, also testified that they had not noticed the "perform at bedside" line on the blood transfusion card prior to the September 11 incident. (GC Ex. 2. Tr. 952, 957, 960, 1599, 2807, 2816). Even nurses in other departments, who occasionally worked in the ICU, had similar experiences with ICU nurses failing to perform the check at the bedside. Jackie Thompson testified that she was performing a check with ICU team leader Scott Goldsmith who failed to follow the protocol. (Tr. 1765-66). When Thompson made her director, Kansas Underwood, aware of the incident with Goldsmith her concerns were dismissed and nothing was done. (Tr. 1774-76).

The Nursing Peer Review Committee convened for a second time on September 23.[9] This time, Ames and Raupers were both present – which was unusual as they do not typically attend Nursing Peer Review Committee meetings. (Tr. 2858, 3481). At no point did they mention the employee interviews Ames had performed at the committee's behest. (GC Ex. 68, 69). They did not inform the committee that other ICU nurses reported doing the blood transfusion check the same way that Marshall and Lamb did – with only the primary nurse performing the bedside check. Nor did Respondent present the committee with any information obtained from its meeting with Lamb. Instead, Ames "presented the results" of her investigation by reading the solicited written patient complaint to the committee. (Tr. 769, 3272-73). Ames then left, while Raupers remained. Under the direction of MacCheyne, who directly supervised at least two of

[9] Terri MacCheyne, Respondent's Director of Maternal-Child Health and chair of the committee, testified that the Nursing Peer Review Committee discussed the September 11 incident at one meeting, on September 23. (Tr. 2854-55). MacCheyne testified that Ames and Raupers were at that meeting, and at that meeting Ames read the patient's complaint to the committee. (Tr. 2858, 2861).

the RNs on the committee, the committee held rounds of voting and discussion until it reached a consensus. (Tr. 3482). Although the committee at the previous meeting had requested that Respondent interview the nurses involved in the incident, at the September 23 meeting the committee, with Raupers present, was able to reach a conclusion without any information from Lamb or Marshall.

In addition to Ames, Raupers, Crumb, and the "advice" of the Nursing Peer Review committee, there were also a few additional people who inserted themselves into the investigation. On about September 22, Daniel Sudilovsky, chairman of the pathology laboratory medicine and the director of laboratories, made an unsolicited phone call to Raupers to discuss the investigation. (Tr. 1832, 1882). All he claims to have known at the time was the content of the patient's complaint, that the two nurses filled out the transfusion card, that the two ICU nurses involved were seasoned, and that they had completed the most recent transfusing blood review. (Tr. 1886-87). It is unclear how Sudilovsky became aware of the patient complaint. Even when she went to speak to him, Raupers never asked for his advice or input. Sudilovsky provided his input anyway in the form of a letter sent on September 26 that cast egregious assertions about the nurses' conduct. (R. Ex. 17). At the time he wrote his letter, Sudilovsky had no information about the results of the peer review committee discussion, or the statements of the nurses directly involved in the incident (in part because Respondent had not yet spoken to Marshall).

The September 26 letter was not the first time that Sudilovsky offered his opinion with respect to a blood transfusion incident. In October 2012, the wrong blood got into a patient's room and was actually hung, but not started, before the error was discovered. Sudilovsky was informed of the incident well after the fact. In that case, when he offered his opinion on how Respondent ought to respond to the incident, his concerns were largely ignored. (GC Ex. 53, p.

003). After the October 2012 near miss blood transfusion incident, he sent the following unsolicited email in the middle of a long string of emails, "I need to weigh in on this string for the record. We cannot minimize the potential severity of this event or its obvious implications; that numerous errors lead to a potentially lethal situation for a patient. We can wipe our brow that this was a near miss, but the follow through needs to be zealous." (GC Ex. 53, p. 003). He was right, the hospital had minimized the event, Ames and another manager even went so far as to say that she did not want the nurses feeling beat up on. (GC Ex. 53, p. 008). Sudilovsky went on to say "the Band-Aid approach described below is inadequate in my opinion. I do agree that Toni and I should have been informed of this the day it occurred and been involved with any decisions as to how to proceed." (GC Ex. 53, p. 003). Sudilovsky's involvement did not alter the hospital's response to the October 2012 incident, nor was he involved "on the day" of the September 11 incident. His opinion was not sought by Respondent – instead, he inserted himself into the process.

On about September 27, Vice President of Public Relations John Turner inserted himself into the case when he attempted to investigate it, despite this not being part of his typical job duties, by speaking with the patient's sister, Star York. (Tr. 875-77). His notes of this conversation differ from his testimonial recollection; the notes clearly show a litany of other issues York brought to his attention, but his testimony relates all the issues to Marshall.[10] (GC Ex. 18; Tr. 880-83). This further demonstrates Respondent's biased investigation and continued animus toward her.

[10] York's testimony makes clear that her complaints were largely unrelated to the September 11 blood transfusion and more about her sister's care generally. (Tr. 501-05).

Marshall was suspended on October 4, after a brief meeting with Linda Crumb, Karen Ames, and Brian Forrest.[11] (Tr. 1241). Much like the suspension meeting with Lamb, Ames questioned Marshall about blood transfusions generally and asked her to confirm her signature on the blood transfusion card from September 11. (Tr. 1241). Neither Ames nor anyone else in the meeting ever asked Marshall to describe what actually happened on September 11. (Tr. 1241-42). Marshall did explain during the meeting that she forgot the bedside check was a requirement because the department has been perpetually short-staffed since she has been hired, so it had been common practice to check the blood at the nurses' station without a two-nurse follow-up at the bedside. (Tr. 1242-43). Marshall was suspended at the conclusion of this meeting. (Tr. 1242).

During the afternoon of October 4 Ames allegedly spoke with Goldsmith to discuss the September 11 incident. According to Ames' notes, she finally confronted Goldsmith about a variety of issues, including staffing levels and whether Marshall had requested help a month prior. (R. Ex. 21). Goldsmith entirely failed to recall this meeting at trial. (Tr. 2949). Importantly, he also could not recall whether Marshall had requested help in checking the blood on September 11. (Tr. 2934-36). After multiple attempts to lead him to an answer on this issue, Goldsmith testified on direct:

> Q: I'm asking you what happened, Scott. If Anne says that before she got Loran Lamb she asked you first if you could assist her with that transfusion, what would you say about whether – do you recall that being the case or not being the case?
> A: It was nine months ago. She may or may not have asked me.
> Q: Okay. So you don't know whether she asked you or not?
> A: I don't – no.

Raupers, the self-proclaimed main decision maker, did not interview the other ICU nurses, did not interview Goldsmith either time he was allegedly questioned, did not attend

[11] Marshall requested Mary Day be present as a witness to the meeting because of all the union-related issues she has had previously with Respondent. Respondent denied her request.

Lamb's suspension meeting, did not speak to Lamb at all prior to her termination, and only spoke to Marshall during her termination meeting. (Tr. 3593-94). She did, however, have a meeting on October 4 with Brian Forrest and CEO John Rudd about the decision to terminate Lamb and Marshall. (Tr. 3561).

The next day, October 5, Lamb was terminated. (R. Ex. 26(b)). During this meeting Raupers informed Lamb that "she has heard from every nurse" that "they're angry that I can't treat you and Anne differently to be honest." (R. Ex. 26(b), p. 10-11). Marshall was terminated October 6.

After the terminations Raupers received a favorable performance evaluation for doing "an exceptional job dealing with the labor organizing threats we faced this year" which went on to specifically cite the blood transfusion incident. (GC Ex. 75). The record evidence relating to Respondent's investigation shows that these terminations were a foregone conclusion.

D. Disparate treatment

The facts make clear that Lamb and Marshall were treated differently than other similarly situated employees because of their support for the Union. Marshall was the subject of a number of previous unfair labor practices which were based on Respondent unlawfully targeting her for her union support according to ALJ Goldman's decision. (ALJD 51:25-27; 57:41-42; 63:37; 69:36-39). Marshall continued to advocate for the Union after the conclusion of the previous administrative hearing by hanging flyers and distributing information. (Tr. 1186, 1528; GC Ex. 72). The hospital continued to equate Marshall with the Union even after the original trial. (GC Ex. 24). Lamb also testified that she engaged in a variety of union advocacy activities. Lamb sat at a table in the cafeteria with Marshall on behalf of the Union, and wore a button on about two thirds of her shifts that she got from Marshall that showed her support for the Union. (Tr. 1528-

31). She told a cafeteria supervisor that the button indicated her support for the Union. (Tr. 1530). Lamb was wearing her union support button during a meeting with Ames and Crumb in late August or early September, mere days before the blood transfusion incident. (Tr. 1531).

There is an avalanche of evidence establishing that Marshall and Lamb were treated differently than other employees. Over one hundred incident reports entered the record where an employee was not disciplined for their misconduct. (GC Ex. 8-14). Rather, in each of these incidents, the employee involved was simply reeducated on the policy. (GC Ex. 8-14). This included incident reports where patients were medicated in contravention of known allergies, doctors' orders, and red rules. (GC Ex. 8-14). Half of these incident reports specifically addressed blood transfusion errors, such as transfusion card issues and failures to follow the blood transfusion policy. (GC Ex. 10-13). In some instances patients never received their pre-transfusion medication, no vital signs were taken, and they were sent home with possible transfusion reactions. (GC Ex. 10-13). Yet, none of these employees received so much as a verbal warning for their conduct. (GC Ex. 10-13).

Respondent referenced the October 2012 incident as relevant in this proceeding as it allegedly led to an employee's termination after a blood transfusion incident. In October 2012 Katie Ritchie was the primary nurse for a patient in need of a blood transfusion. (Tr. 2355). She sent Seth Mead to pick up the blood from the blood bank. (Tr. 2356; U. Ex. 3). En route he received a second blood requisition form. (U. Ex. 3). Confusing the two patients, Mead returned the wrong blood to Ritchie. (Tr. 2356-57). Ritchie spiked and hung the blood for her patient prior to checking to see if it was the correct blood for the correct patient. (Tr. 2358; U. Ex. 3). She asked Nathan Newman, the secondary nurse, to check the blood with her prior to running it on

the patient. (Tr. 2356, 2359). It was during this check that Mead told them to stop as he realized they had spiked and hung the wrong blood for the wrong patient. (Tr. 2360; U. Ex. 3).

Respondent's follow-up to that incident was entirely different than this incident. After the October 2012 incident, Ames and the employees' manager Kevin Flint did not want the nurses "feeling beat up on." (GC Ex. 53, p. 008). According to Ames the incident "would not actually be classified as a serious safety event because there was no patient harm." (GC Ex. 53, p. 016). Respondent maintains that Ritchie was fired for this incident, although it did not produce or offer into the record any letter of termination such as it provided to Marshall and other employees it fired. Moreover, Ritchie had a history of diverting narcotics. Respondent, which takes diverting narcotics "very seriously," took that fact into account when deciding to terminate her. (Tr. 2449). Emails sent following the incident do not indicate that Ritchie was fired or that she was fired for this incident. Instead, they state that "the nurse that was involved in this incident is no longer an employee here." (GC Ex. 53, p. 009).

Respondent cited five specific instances of misconduct which it erroneously regards as demonstrating consistency in administering discipline. Each of these instances is either wholly inapplicable or easily distinguishable. Victoria Comstock was practicing outside the scope of her license when she administered a drug to an adolescent patient, under another patient's name, against the parent's express consent, without seeking a physician's order, and then failed to document having given the medication. (R. Ex. 34; Tr. 2213). Joanne McDonald's termination was the culmination of a clear pattern of misconduct. (GC Ex. 49; Tr. 2246-48). McDonald was finally terminated when she fabricated the weight of a patient with congestive heart failure without ever having weighed the patient. (R. Ex. 32; GC Ex. 49; Tr. 2222). Raven Smith-Paris, who also had documented performance issues, was terminated when she admittedly fabricated

vital signs for a patient because she never took the vital signs. (R. Ex. 33; GC Ex. 50; Tr. 2226, 2249-56). After having been previously counseled for a variety of job deficiencies, including one directly related to her termination, Deborah Noonan was finally terminated when she admitted that she pre-marked the crash cart inventory checklist months in advance without ever actually checking the crash cart. (R. Ex. 31; GC Ex. 47, 48; Tr. 2148-50; 2155-61). Finally, Respondent terminated Martin Whitford based on empirical evidence that he fabricated urinalysis results by entering data for tests he never ran. (R. Ex. 30; Tr. 3026).

E. Removing pro-union flyer

In a continuation of its previous identical unlawful acts, in about July 2016 Anne Marshall witnessed Respondent's admitted supervisor Jackie Barr removing a union flyer from a third floor hallway bulletin board. (Tr. 1188, 1197). Marshall had just put up the union meeting notice when she saw Barr take it down. (Tr. 1188; GC Ex. 35). Barr removed nothing else at this time, even though the board at that time also held other non-hospital related postings like a Jehovah's Witness card and a salsa dancing posting. (Tr. 1188-89). Even by Barr's own admission at the administrative hearing, she took down the union flyer, was confronted by Marshall, but nevertheless took down the flyer anyway. (Tr. 2880).

IV. ANALYSIS

The evidence and applicable case law establish that Respondent violated Section 8(a)(1) and (3) of the Act, by suspending and terminating Anne Marshall and Loran Lamb because of their union activities. The evidence and applicable case law further establishes that Respondent

violated Section 8(a)(1) of the Act by prohibiting employees from posting union literature around the facility while permitting employees to post other literature.[12]

A. Respondent's treatment of Anne Marshall and Loran Lamb violated Section 8(a)(1) and (3) of the Act

The evidence shows Marshall and Lamb were suspended and terminated because of their union activity in violation of Section 8(a)(1) and (3) of the Act. There is no dispute that Respondent was well aware of Marshall's union activity. While Respondent was also aware of Lamb's union activity and support, even if it was not aware, Lamb's suspension and termination would have been a casualty of Respondent's continued targeting of Marshall.

i. Anne Marshall and Loran Lamb were suspended and terminated because of their union advocacy

To establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd. on other grounds* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[13]

[12] As explained previously, upon a further review of the evidence in the record, Counsel for the General Counsel has withdrawn the *Johnnie's Poultry* allegations that were amended into the complaint at hearing.

[13] The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at

Evidence that may establish a discriminatory motive – i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee's protected activities (*see, e.g., Austal USA, LLC*, 356 NLRB No. 65, slip op. at *1 (2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) close timing between discovery of the employee's protected activities and the discipline (*see, e.g., Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (3) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (*see, e.g., Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), *enf'd. mem.* 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (4) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (*see, e.g., Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014); *Manor Care Health*

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the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

Services–Easton, 356 NLRB No. 39, slip op. at 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), *enf'd. sub nom. NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can defeat a finding of a violation only by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*.

Based on the testimony and evidence adduced at hearing, it is clear that Marshall and Lamb engaged in known protected activity and that Respondent's hostility to that activity "contributed to" its decision to take an adverse action against the employees. There is no dispute that Marshall engaged in protected activity and Respondent knew of her actions. Respondent even took unlawful actions against Marshall because of her union activity in a previous unfair labor practice case. Respondent's previous unlawful acts against Marshall because of her union activity were a heavily litigated issue and ALJ Goldman found that the adverse performance allegations against Marshall were based on her union activity. (ALJD 51:25-27; 57:41-42; 63:37; 69:36-39). In the previous administrative hearing, Respondent's supervisor made specific threats to Marshall regarding her being the "ring leader" and "promoting all this union stuff." (ALJD 18:20-22; 18:42). Marshall's union activity continued after the conclusion of the previous administrative hearing through her soliciting colleagues, hanging flyers, and passing out union

material. (Tr. 1186, 1528; GC Ex. 72). In turn, Respondent's anti-union animus continued as is demonstrated by its email equating Marshall with the union and its unlawful act of removing her posted pro-union material from bulletin boards. (GC Ex. 24).

Lamb also engaged in union activities. As she testified, she openly sat at a pro-union table in the cafeteria, a particularly brave action given Respondent's previous actions on this issue. (ALJD 13-15). Lamb also wore the pro-union button that Marshall had given her on two thirds of her shifts. She told a cafeteria supervisor she wore the button specifically to show her union support. Lamb happened to be wearing this button during a conversation with Ames and Crumb mere days before the incident leading to her suspension and termination. She also freely advocated her opinions in meetings involving staffing issues and safety, issues which management knew were pro-union positions based on the previous hearing.

The "investigation" into Marshall and Lamb's actions overwhelmingly supports the finding that the employees were suspended and terminated for their union activity. Multiple exhibits demonstrate that the investigation had a pre-determined outcome. (GC Ex. 21, 22, 32). Marshall's suspension letter was drafted before anyone ever spoke to her. (GC Ex. 22). In this letter Respondent presupposed her defenses[14] to the allegations that had yet to be presented to her. (Tr. 1013, GC Ex 22). Moreover, in this September 16 letter, Respondent relied upon her previous unlawful disciplines, including her July 1, 2015 suspension. As ALJ Goldman explained in his previous decision, "It is well settled that a decision to discipline an employee is tainted if the decision relies on prior discipline that was unlawful. *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995); *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989),

[14] The fact that they were weeks from speaking to Marshall and the total uncertainty with how she would respond belies Respondent's argument that this was simply a preparatory act. Even if it were, it was a preparation for the inevitable – Respondent's foregone conclusion that Marshall would be suspended and terminated.

(discharge based on previously issued unlawful warnings violates Section 8(a)(3)), *enf'd*. 928 F.2d 609 (1991)." (ALJD 64:19-23). Respondent having relied on Marshall's previous disciplines is consistent with their policy regarding terminations. For example, Respondent relied on McDonald, Smith-Paris, and Noonan's extensive disciplinary history prior to their terminations. Respondent also drafted a letter to be sent to all employees, volunteers, physicians, and others to inform the public of its decision to terminate the two employees well before they had even spoken to Marshall or concluded the investigation. (GC Ex. 19). Admittedly it seems that Respondent later disavowed such reliance in this instance, but that is inconsistent with its prior practices.

When faced with evidence contrary to Respondent's pre-spun story about departmental compliance with the policy, Respondent chose to ignore it. (Tr. 913, 975, 978, 1082-84, 1705-06, 1117-18, 1134, 1163, 1727). Even Ames' own notes on her conversation with Terri Ellis, who did not testify in this hearing, stated that she "can't say that there has never been an occurrence when it was done away from the bedside such as at the nurses' station." (R. Ex. 9). Respondent's quality and patient safety specialist suggested on September 30 that Respondent undertake covert observation of blood transfusions to make sure they were being done correctly. Respondents' lead investigator, Ames, replied on October 4 and told her not to undertake those observations 'yet'. (GC Ex. 74, Tr. 3409-10). Further, Ames had practically no experience acting in the capacity of primary investigator, and seemed not to have the basic medical knowledge to make any assessments into the validity of certain claims. (Tr. 800-05, 807-09). Jackie Barr, the person

responsible for investigating patient complaints, was completely left out of the equation.[15] (Tr. 2878, 3598-99).

Respondent consistently failed to follow its own policy regarding handling patient complaints during this investigation. (Tr. 2878-79; 3598-99; R. Ex. 55). The patient's written complaint,[16] which Respondent solicited and upon which Respondent seems to have heavily relied, was inconsistent with the patient's previous statements and known blood transfusion procedure.[17] (R. Ex. 1, 4, 5, 6). The patient's sister, Star York, even questioned the patient's mental capacity during the September 11 incident. (Tr. 519). Respondent also failed to present any evidence that it investigated any of the other complaints put forth by the patient and York. A mountain of evidence proves Respondent's disparate treatment as discussed below. Scott Goldsmith summarized the issue best when he recounted his understanding of why he had been questioned by Respondent's attorney: "there was going to be an unlawful firing." (Tr. 2912). Indeed, there was an unlawful firing. It is clear that Respondent suspended and terminated Marshall and Lamb for their union activity, in violation of Section 8(a)(1) and (3) of the Act.

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[15] Even if she was involved in some capacity, Respondent called Jackie Barr to discuss a different matter, asked no questions about this issue, and refused to let the General Counsel question her about her job duties or role in this case. Such an action should be met with a negative inference. *See, Atelier Condominium and Cooper Square Realty*, 361 NLRB No. 111, slip op. at 36 (2014) (a witnesses' failure to provide specific testimony about such disputed matters will support an inference that such testimony, if truthful would not support the propounded version of events); *see e.g., S&F Enterprises, Inc.*, 312 NLRB No. 123, 811 (1993) (adverse inference drawn because counsel failed to question witness on a relevant issue); *Colorflo Decorator Products*, 228 NLRB 408, 410-11 (1977) (adverse inference drawn based on a party's failure to question a witness on a specific issue about which that witness may have had knowledge).

[16] Besides her sister's testimony, the patient's uncorroborated email is all the court has to rely upon for her view of the incident as Respondent failed to present the patient despite a subpoena and multiple assurances that it was going to call her.

[17] The patient's complaint implies that nurses scanned her wristband before hanging blood. However, testimony consistently proved Respondent does not have the capacity to scan a wristband for blood product administration at this time.

ii. Even if Respondent was somehow unaware of Loran Lamb's union support, she was collateral damage in Respondent's unlawful pursuit of Anne Marshall

Respondent must be held responsible for terminating Lamb, even if the purpose of her termination was to bolster the legitimacy of Marshall's termination. Respondent is not the first employer to take unlawfully motivated action against one employee resulting in consequences to another employee to lend its actions "an aura of legitimacy." *See, e.g., Pillsbury Chemical & Oil Co.*, 317 NLRB 261, 261 (1995). Much like the criminal "fruit of the poisonous tree" principle, Respondent's termination of an employee without a specific unlawful motivation is still unlawful if it is the direct result of an unlawful motive aimed elsewhere. *FiveCAP, Inc.*, 331 NLRB 1165, 1169 (2000) (Board analogizes issue to "fruit of the poisonous tree" principle and held that unlawful motive for two discharges directly resulted in layoff of third employee). The facts of this case support a conclusion similar to that of *Stark Electric, Inc.*, where the Board found that the respondent violated the Act by laying off employees who engaged in union activities along with other employees of unclear levels of union involvement to generally discourage union activities. 324 NLRB 1207 (1997). Similarly, the Board has held that firing an employee who was not a union member or activist was unlawful since Respondent took that action to show consistency with firing an unwanted union activist and conceal its anti-union animus. *Greenfield Die and Manufacturing Corp.*, 327 NLRB 237, 247 (1998).

Respondent attempted to use its decision to terminate Lamb to camouflage its unlawful motivation for terminating Marshall. Respondent has been on a crusade against Marshall, and therefore in its view, the Union, since 2015. (ALJD 47:7-9). The record evidence shows that Respondent's focus was on 'handling' Marshall's termination. Respondent never "pre-drafted" Lamb's suspension or termination letter, only Marshall's letter. (GC Ex. 22, 27). Lamb was a

shield to lend validity to Respondent's actions against Marshall. If Respondent did not have the goal of terminating Marshall, then Lamb would never have been fired over this incident. During her termination Raupers even confided in Lamb that other nurses were angry that Respondent could not treat Lamb and Marshall differently. (R. Ex. 26b). In October 2012 the secondary nurse, the nurse in the same posture as Lamb in this case, was not terminated or even disciplined for his role in the serious near miss. (GC Ex. 53; Tr. 2367-68). Lamb's suspension and termination are a direct result of Respondent's unlawful termination of Marshall.

iii. Disparate treatment

As previously explained, evidence of pretext includes the employer's disparate treatment of the alleged discriminatee compared to other employees with similar offenses and departure from past practice when imposing the adverse action. *See Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Evidence of disparate treatment can also be used to undermine Respondent's *Wright Line* assertions. Any affirmative defense advanced by Respondent on this front is disingenuous by virtue of the fact that none of the examples it proffered as comparable are actually so.

After being prompted to do so by the peer review committee, because it could not make any assessment without more information,[18] Respondent spoke to four ICU nurses who all stated that they occasionally failed to follow the blood transfusion policy. (Tr. 978, 1117-18, 1134, 1163, 1727; R. Ex. 11). This information did not temper Respondent's actions toward Marshall and Lamb – nor did Respondent take any action against those nurses. Indeed, the knowledge that its policy was routinely being violated did not even prompt Respondent to reiterate the importance of the policy to its employees. It did not even review the practices of the nurses to

[18] Oddly, the second peer review committee session was never presented with the information it requested.

demonstrate compliance with the policy. (GC Ex. 74). Instead, Respondent glossed over the employees' responses because they were unfavorable to the conclusion it had already drawn – that Marshall and Lamb should be terminated.

Respondent advanced five cases to support its affirmative *Wright Line* defense. Each instance is too factually dissimilar to be instructive. Victoria Comstock was working outside the scope of her practice when she administered a drug to an adolescent patient, under another patient's name, against the parent's express consent, without seeking a physician's order, and then failed to document having given the medication. (R. Ex. 34; Tr. 2213). Marshall and Lamb were acting well within their purview as nurses in performing a blood transfusion. Respondent's own witness, Barbara Goodwin admitted that nurses have autonomy to assess a variety of factors and make decisions – as long as they are working within the scope of their practice. (Tr. 2030, 2032). Moreover, there is no dispute that Marshall and Lamb checked the patient's consent and appropriately documented what they had done. There is no dispute that Marshall appropriately pre-medicated the patient and gave the correct blood as prescribed. (Tr. 2034).

Joanne McDonald was finally terminated when she fabricated the weight of a patient with congestive heart failure without ever having weighed the patient. (R. Ex. 32; GC Ex. 49; Tr. 2222). McDonald's termination was the culmination of a clear pattern of misconduct. (GC Ex. 49; Tr. 2246-48). Raven Smith-Paris, who also had documented performance issues, was terminated when she admittedly fabricated vital signs for a patient. (R. Ex. 33; GC Ex. 50; Tr. 2226, 2249-56). Respondent terminated Martin Whitford based on empirical evidence that he fabricated urinalysis results by entering data for tests he never ran. (R. Ex. 30; Tr. 3026). After having been previously counseled for a variety of job deficiencies, including the duty that led to

her termination, Deborah Noonan was finally terminated when she admitted that she pre-marked the crash cart inventory checklist months in advance without ever actually checking the crash cart. (R. Ex. 31; GC Ex. 47, 48; Tr. 2148-50; 2155-61).

Unlike these incidents that Respondent cited about "falsification of records," Marshall and Lamb fabricated nothing. There was no evidence presented demonstrating intent. Marshall explained repeatedly to Respondent, and testified at the hearing, that she forgot the portion of the policy that required a two-nurse bedside verification because of a differing long-standing practice. Even Lamb, who admitted failing to follow the letter of the policy after being confronted with the policy requirements, had no intent to falsify the record. Marshall and Lamb performed a thorough check of all of the requirements on the blood transfusion card. Marshall and Lamb certified to having performed the check, even if it was in a different location than a fine print header prescribed. These examples might have been more applicable if Marshall and Lamb had performed no check, but the fact that a check was performed was not disputed. Moreover, neither Marshall nor Lamb had any previous disciplinary issues,[19] which was a determining factor in the aforementioned terminations.

During the hearing, Respondent chose to present numerous witnesses to testify about the October 2012 incident – despite the fact that it is distinguishable from the instant case because the nurses were following a different set of policies and procedures. Not only that, but the nurses actually hung and spiked the wrong blood, in the patient's room, before checking it. Even if, despite these differences, the situations were analogous, Respondent's reaction in 2012 (when

[19] Any disciplines Marshall had in her file were found to be based on her union activity. (ALJD 38:20-22). If Respondent did rely on her previous unlawful disciplines as it states in GC Ex. 22, then her suspension and termination would also be unlawful. *Care Manor of Farmington, Inc.*, 318 NLRB at 726; *Dynamics Corp.*, 296 NLRB at 1253–1254 (discharge based on previously issued unlawful warnings violates Section 8(a)(3)).

the wrong blood actually entered the room and was hung) was far less severe than in this case. Respondent reacted in 2012 by 'debriefing' two of the three nurses and not punishing them because of concerns they would 'feel beat up on,' and classifying the event as 'not a serious safety event' because there was no harm to the patient. Indeed, the only one of the three nurses involved to leave the hospital had a history of failing to follow policy and was known to be diverting narcotics. (GC Ex. 56, 57, 58). Mysteriously, her personnel file does not contain a termination letter.

In contrast, the General Counsel presented over one hundred incident reports for equally or more egregious violations of policy and medical errors than the one at issue here, where employees received no discipline. (GC Ex. 8-14). About half of these incident reports addressed blood transfusion issues, including hanging expired blood and ignoring possible transfusion reactions. (GC Ex. 10-13). Respondent failed to present any evidence disputing the incidents, any evidence to show these employees were disciplined in any way, or any evidence to show investigations that occurred as a result of these violations. Moreover, Respondent's failure to dispute these incident reports amounts to a tacit admission that these incidents were at least equal in severity and therefore that Marshall and Lamb were treated differently. There was also an incident in mid-July, which was self-described as factually indistinguishable to the September 11 incident, where the ICU nurse involved failed to perform a bedside patient verification and instead used stickers at the nurses' station. (GC Ex. 30). Unsurprisingly this nurse received no discipline and nothing was placed in her file. (GC Ex. 30). In conclusion, the General Counsel's overwhelming display of pretext coupled with Respondent's failure to present a legitimate *Wright Line* defense proves the unlawful nature of Marshall and Lamb's suspensions and terminations.

B. Respondent unlawfully removed Anne Marshall's union flyer

Respondent has yet again unlawfully restricted the posting of union materials. An employer violates the Act if it prohibits "the posting of material relating to and in the course of concerted activity of its employees, while having previously allowed the posting of other miscellaneous matters by the employees." *Waste Management, Inc.*, 330 NLRB 634, 635-636 (2000) (citing *Vincent Steak House*, 216 NLRB 647 (1975) *aff'd*, 559 F.2d 187 (D.C. Cir. 1997) (table)); *Alle-Kiski Medical Center*, 339 NLRB 361 (2003) (enforcement of policy discriminatory where employer permitted solicitations such as Girl Scout cookies, office pools, and hoagie sales to benefit a local school); *BRC Injected Rubber Products, Inc.*, 311 NLRB 66, 73-74 (1993) (finding disparate treatment where employer permitted sale of candy, Girl Scout cookies, and other products by employees). Any asserted posting practice/policy purely based on content rather than type is unlawful under *Register Guard*, 351 NLRB 1110 (2007), supplemented by 357 NLRB No. 27 (2011), because it targets only Section 7 related material.

In about July 2016, Anne Marshall witnessed admitted supervisor Jackie Barr removing a union flyer from a third floor hallway bulletin board. (Tr. 1188, 1197). Marshall had just put up the union meeting flyer when she saw Barr take it down. (Tr. 1188; GC Ex. 35). Barr took nothing else down at that time, despite the fact that also on that board were other non-hospital related postings like a Jehovah Witness card and salsa dancing. (Tr. 1188-89). Marshall confronted Barr, but Barr took down the flyer anyway.

This is not the first allegation of such misconduct. ALJ Goldman previously held that Respondent unlawfully removed union postings from bulletin boards. (ALJD 22:19-21). In the previous case, Respondent admitted that employees are permitted to post materials on bulletin boards and the issue was not in dispute. (ALJD 20:38-40). Barr, the same bad actor in this case,

was also found to have removed union flyers in the previous case. (Tr. 1197; ALJD 21:13-14). Respondent also unlawfully removed union postings from the same bulletin board in the previous case as is alleged in this case. (Tr. 1189). In that case, Linda Crumb sent an email to the house supervisors stating "when you make your rounds remove union material at the time clocks…. Security has been instructed to do the same. They have the right to put up and we have the right to take down." (Hearing #1 GC Ex. 22). Linda Crumb took this same position on at least one other occasion. (Hearing #1 GC Ex. 24). There was also an email sent with the subject line 'flyers at timeclocks,' which specifically indicated that SEIU newsletters were removed from the time clocks. (Hearing #1 GC Ex. 23). At that time, Respondent was removing union materials up to four times a shift. (Hearing #1 Tr. 1007, 1035; Hearing #1 GC Ex. 22, 23, 24, 44, 47). Respondent never established that it had a practice or policy of banning any postings other than Section 7 related material.

Respondent now contends that it altered its position after the previous hearing on such removal, without providing any evidence to support such a claim. Respondent failed to provide evidence of what or how it disseminated such information to its supervisors or when it did so. Then, Respondent attempted to discredit Marshall's testimony on this issue by having Jackie Barr claim the board she took a picture of, months after the misconduct, is not in the hallway near a third floor time clock as Marshall claimed. However, Christine Monacelli clearly testified, and presented pictorial evidence, to the contrary. (Tr. 3611-14, 3615; GC Ex. 76, 77).

Furthermore, as was established in both hearings, Respondent allows a wide array of non-work related postings on its bulletin boards, and it banned the distribution and posting of union-related materials based purely on their Section 7 character. Accordingly, any asserted

posting practice/policy purely based on content rather than type is unlawful under *Register Guard* because it targets only Section 7 related material.

Accordingly, Respondent's actions in removing pro-union literature violated Section 8(a)(1) of the Act.

V. NOTICE READING REMEDY

A notice reading remedy is necessary and appropriate in this case. In *DHSC, LLC*, 362 NLRB No. 28, slip op at *1 (2015), the Board found a notice reading appropriate because of "the serious and persistent nature of the Respondent's multiple unfair labor practices." Reading the notice aloud, whether by a high-ranking management official at the facility or by an Agent of the National Labor Relations Board, "serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future." *Id.* This case is analogous to *DHSC, LLC*. There, an employer unlawfully and discriminatorily warned and discharged a nurse employee, and reported her to the state nursing board. Among other remedies, the Board required the employer to read the Board's notice to unit employees during their paid work-time, in the presence of a Board agent, at a time and date selected by the union. Alternatively, the employer could opt to have the notice ready by the Board agent in the presence of a responsible official of the employer.

In this case, Respondent's unfair labor practices include suspension and discharge of the lead union organizer and a union supporter during the critical period of a union organizing campaign. Further, Respondent is a recidivist with multiple previous unfair labor practices, a factor which the Board considers in granting this remedy. *See e.g., Salem Hospital Corp.*, 363 NLRB No. 56, slip op. at 1, fn. 3 ("We find that requiring the notice be read aloud is warranted by the serious and persistent nature of the Respondent's unfair labor practices, especially in light

of its repetition of the same type of misconduct previously found unlawful.") Respondent continued its unlawful act of removing pro-union flyers from its bulletin boards. Respondent continued its targeted unlawful conduct toward Marshall by suspending and terminating her in this case. Respondent's serious and persistent unlawful conduct warrants a notice reading remedy.

Respondent's continued unlawful conduct warrants the notice reading remedy, but Respondent's extraordinary effort to inform all personnel in contact with the hospital of its acts necessitates one. Respondent sent an email announcing the termination of Marshall and Lamb to the entire Central New York medical community. (GC Ex. 7). This included all of Respondent's employees, volunteers, and physicians. (GC Ex. 7). The email even included physicians not employed by the hospital but merely who had admitting privileges there. There is even evidence that Respondent sent the email to non-hospital affiliates. More specifically, Respondent's CFO forwarded the email to medical professionals not affiliated with Respondent and gave this context for the email, "One of the nurses was the lead union organizer. We parted company with the 2 RN's." (GC Ex. 26). Respondent's employees not otherwise involved in the incident responded to the email and questioned why they were receiving a termination notice, a practice otherwise prohibited by Respondent. (GC Ex. 70). Multiple employees testified that they had never received an email like this before. Respondent even held meetings in other departments to inform its employees of the email both before and after it was sent out. (Tr. 1154-55, 1157-58, 1774). One such meeting in the Emergency Department was a mid-shift safety huddle, a meeting which is reserved for medical emergencies and pulled nurses from patient care. (Tr. 1154-55).

A notice reading is only one way to undo some of the damage Respondent caused to the discriminatees' reputation. Respondent should also be required to post a copy of the notice to its

intranet and email a copy of the "Notice to Employees" to all the recipients of the October 6, 2016 email. Respondent's concerted effort to guarantee all of its employees and the community were notified of the action it took against the lead union organizer along with a vocal union advocate evidence the need for a notice reading.

VI. REMEDY FOR CONSEQUENTIAL ECONOMIC HARM

Accordingly, General Counsel respectfully requests the ALJ issue a recommended order finding a violation and requiring Respondent to fully remedy its unlawful suspension and termination of Marshall and Lamb, including through reinstatement, a make whole remedy, and by payment of search-for-work and interim employment expenses, regardless of whether such expenses exceed any interim earnings. *See, e.g., King Soopers, Inc.*, 364 NLRB No. 93 (2016) (incorporating search-for-work and interim employment expenses in calculation of make-whole remedy). Such a remedy would also include consequential economic harm. Under the Board's present remedial approach, some economic harm flowing from a respondent's unfair labor practices are not adequately remedied. *See* CATHERINE H. HELM, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (noting that a traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *See, e.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential

economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and restoring the economic status quo that would have obtained but for the company's [unlawful act]").

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See Tortillas Don Chavas*, *supra*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate

calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful actions. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be

compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[20] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[21]

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Omaha Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of the Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374

[20] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any unlawful conduct by the employer.

[21] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

(1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (considering an award of front pay but refraining from such an order because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private

rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[22] In *Nortech Waste*, supra, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, as in *Nortech Waste*, where there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses)); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).[23] Therefore, General Counsel respectfully requests that the ALJ issue a recommended order fully addressing the unfair labor

[22] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

[23] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also*, *Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

practices alleged in the Complaint, including consequential economic harm incurred as a result of those practices.

VII. CONCLUSION

Therefore, the General Counsel respectfully submits that, for all the reasons set forth above, Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating Marshall and Lamb for their union activities; and, unlawfully restricting union postings. The General Counsel respectfully requests that the ALJ issue a decision and recommended order granting the relief sought herein and any other relief deemed appropriate.

VIII. PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct by removing union material from bulletin boards.
4. Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating Anne Marshall because she engaged in union activities.
5. Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating Loran Lamb because she engaged in union activities or, in the alternative, because she was collateral damage to Respondent's unlawful actions against Anne Marshall.
6. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

IX. PROPOSED ORDER

The Respondent, Cayuga Medical Center at Ithaca, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
    a. Removing and/or confiscating posted union materials from bulletin boards.
    b. Suspending or terminating any employees for engaging in union activities.
    c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
    a. At a meeting or meetings scheduled to ensure the widest possible audience, Respondent's representative John Rudd shall read the notice to employees on work time in the presence of the Board agent or, alternatively, have a Board agent read the notice to employees during work time in the presence of Respondent's supervisors and agents as alleged in paragraph V of the Amended Consolidated Complaint.
    b. Rescind the unlawful suspensions and terminations issued to Anne Marshall and Loran Lamb.
    c. Within 14 days from the date of this Order, offer Anne Marshall and Loran Lamb full reinstatement to their jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

d. Make Anne Marshall and Loran lamb whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions and/or terminations, in the manner set forth in the remedy section of this decision.

e. Compensate Anne Marshall and Loran Lamb for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

f. Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and terminations issued to Anne Marshall and Loran Lamb, and within 3 days thereafter notify them in writing that this has been done and that the suspensions and terminations will not be used against them in any way.

g. Within 14 days after service by the Region, post at its facility in Ithaca, New York copies of the attached notice marked "Proposed Notice to Employees." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means to all employees, volunteers, and physicians. Reasonable steps shall be taken

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees, volunteers, physicians, and former employees employed by Respondent at any time since September 11, 2016.

h. Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

X. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;

Choose a representative to bargain with us on your behalf;

Act together with other employees for your benefit and protection;

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT suspend or terminate you because of your union membership or support.

WE WILL NOT discriminatorily prohibit you from posting union literature throughout the Hospital and **WE WILL NOT** remove or confiscate posted union literature.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL fully reinstate employees Anne Marshall and Loran Lamb to their former positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees Anne Marshall and Loran Lamb whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions and/or unlawful terminations.

WE WILL remove from our files all references to the suspensions and terminations of Anne Marshall and Loran Lamb and within 3 days thereafter **WE WILL** notify them in writing that this has been done and that their suspensions and terminations will not be used against them in any way.

WE WILL notify all volunteers, employees, and physicians of the outcome of this hearing by emailing them a copy of this notice.

DATED at Buffalo, New York, this 26th day of May, 2017.

/s/ Jessica L. Noto

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